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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHEL GELINAS,) NO. 08-CV-02137 (PVT)
Plaintiff,)
v.) ANSWER TO COMPLAINT FOR
THE BERGQUIST COMPANY,) DECLARATORY RELIEF
Defendant.)

COMES NOW Defendant The Bergquist Company, for its Answer to the Complaint for Declaratory Relief (the "Complaint") herein states and alleges as follows:

PRELIMINARY STATEMENT

This is an action preemptively filed by the Plaintiff in an improper, classic "race to the Courthouse" to avoid his written agreement to arbitrate his claims in Minnesota. However, a previously filed action seeking to enforce the parties' agreement to arbitrate is pending in the U.S. District Court for the District of Minnesota, Case No. 08-CV-569 (DWF/AJB), filed February 28, 2008. Based on the first filed rule and the parties' binding arbitration provision, the case should be dismissed or transferred to the District of Minnesota so that the dispute may be resolved in arbitration pursuant to the parties' agreement.

RESPONSE TO COMPLAINT ALLEGATIONS

1. This paragraph of the Complaint is introductory in nature and does not appear to

1 require a response. However, Defendant states that paragraph 1 of the Complaint is an accurate
 2 statement of the factual background of the case. Accordingly, Defendant admits the allegations set
 3 out in paragraph 1 of the Complaint.

4 2. Defendant admits the allegations set out in paragraph 2 of the Complaint but states
 5 that they are legally irrelevant.

6 3. Defendant admits the allegations set out in paragraph 3 of the Complaint.

7 4. Defendant lacks information sufficient to form a belief as to the truth or falsity of the
 8 allegations set out in paragraph 4 and accordingly denies the allegations set out in paragraph 4 of the
 9 Complaint.

10 5. Defendant lacks information sufficient to form a belief as to the truth or falsity of the
 11 allegations set out in paragraph 5 and accordingly denies the allegations set out in paragraph 5 of the
 12 Complaint.

13 6. Defendant denies the allegations set out in paragraph 6 of the Complaint and puts
 14 Plaintiff to the strict proof thereof.

15 7. Defendant denies the allegations set out in paragraph 7 of the Complaint, except that
 16 Plaintiff resides in Santa Clara County, and puts Plaintiff to the strict proof thereof.

17 8. Defendant admits the allegations set out in the first two sentences of paragraph 8 of
 18 the Complaint. Defendant denies the remaining allegations of said paragraph 8. Defendant further
 19 alleges that Exhibit A was not attached to the copy of the Complaint received by Defendant.

20 9. Defendant denies the allegations set out in paragraph 9 of the Complaint, except that
 21 on or about April 27, 2004, Plaintiff commenced his employment with Defendant by attending a
 22 mandatory new employee orientation at Defendant's corporate office in Minneapolis, Minnesota, and
 23 Defendant alleges that Exhibit B was not attached to the copy of the Complaint received by
 24 Defendant.

25 10. Defendant, respectfully, refers the Court to the referenced document for its terms, but
 26 admits the allegations set out in paragraph 10 of the Complaint. Moreover, Defendant further
 27 alleges that these terms are customary and standard in the industry.

28 11. Defendant, respectfully, refers the Court to the referenced document, but admits the

1 allegations set out in paragraph 11 of the Complaint. Moreover, Defendant alleges that the
 2 Separation Agreement does contain arbitration provisions that control this dispute.

3 12. Defendant denies the allegations set out in paragraph 12.

4 13. Defendant denies the allegations set out in paragraph 13 of the Complaint. Further, a
 5 determination of this issue is for the arbitrator to be selected by the parties in accordance with their
 6 agreement.

7 14. Defendant denies the allegations set out in paragraph 14 of the Complaint, except that
 8 on or about October 23, 2007, Plaintiff's employment was terminated and he was offered a
 9 Separation Agreement, which he accepted and signed voluntarily, that requires the parties to resolve
 10 any dispute through binding arbitration in Minneapolis, Minnesota. Defendant, respectfully, refers
 11 the Court to the referenced documents for their terms and denies the remaining allegations of
 12 paragraph 14. Defendant alleges that Exhibit C was not attached to the copy of the Complaint
 13 received by Defendant.

14 15. Defendant lacks information sufficient to form a belief as to the truth or falsity of the
 15 allegations set out in paragraph 15, denies the same and puts Plaintiff to the strict proof thereof.

16 16. Defendant admits the allegations set out in paragraph 16 of the Complaint.

17 **FIRST CAUSE OF ACTION**

18 17. The allegations in paragraph 17 requires no response on the part of this answering
 19 Defendant, but to the extent that a response is required, Defendant repeats its responses set out in
 20 paragraphs 1 through 16 herein.

21 18. Defendant admits the allegations set out in paragraph 18 of the Complaint.

22 19. Defendant admits that Plaintiff apparently so contends, but Defendant denies the
 23 allegations set out in paragraph 19 of the Complaint, and asserts that the agreements between the
 24 parties provide that the governing law shall be the laws of the State of Minnesota, and that this
 25 dispute shall be resolved in arbitration in Minneapolis, Minnesota.

26 20. Defendant admits that Plaintiff apparently so contends, but Defendant denies the
 27 allegations set out in paragraph 20 of the Complaint.

28 21. Defendant admits that Plaintiff apparently so contends, but Defendant denies the

1 | allegations set out in paragraph 21 of the Complaint.

SECOND CAUSE OF ACTION

3 22. The allegations in paragraph 22 requires no response on the part of this answering
4 Defendant, but to the extent that a response is required, Defendant repeats its responses set out in
5 paragraphs 1 through 21 herein.

6 23. Defendant admits the allegations set out in paragraph 23 of the Complaint.

7 24. Defendant admits that Plaintiff apparently so contends, but Defendant denies the
8 allegations set out in paragraph 24 of the Complaint.

9 25. Defendant admits that Plaintiff apparently so contends, but Defendant denies the
10 allegations set out in paragraph 25 of the Complaint and puts Plaintiff to the strict proof thereof.

11 26. Defendant admits that Plaintiff apparently so contends, but Defendant denies the
12 allegations set out in paragraph 26 of the Complaint, and asserts that the agreements between the
13 parties provide that the governing law shall be the laws of the State of Minnesota, and that this
14 dispute shall be resolved in arbitration in Minneapolis, Minnesota.

15 27. Defendant admits that Plaintiff apparently so contends, but Defendant denies the
16 allegations set out in paragraph 27 of the Complaint.

17 28. Except to the extent answered, qualified or otherwise responded to herein, Defendant
18 denies each and every matter, allegation, and thing in the Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

1. Failure to state a claim upon which relief can be granted.

2. This action should be dismissed or transferred because there is a previously filed action between the same parties concerning the same subject matter pending in the U.S. District Court for the District of Minnesota, Case No. 08-CV-569 (DWF/AJB).

3. This action should be dismissed because the claims asserted herein are within the scope of the arbitration provision of the agreements between the parties.

4. Plaintiff's claims are preempted by Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2.

5. Venue in this judicial district is improper and is contrary to the provisions of the

1 choice of forum provision contained in the Contract upon which Plaintiff based his claims in this
 2 action.

3 6. Plaintiff's Complaint fails for insufficiency of process and/or insufficiency of service
 4 of process.

5 7. Plaintiff's claims are barred by the doctrines of waiver, estoppel, and/or unclean
 6 hands.

7 8. Plaintiff's claims are barred by their failure to exhaust administrative and/or
 8 contractual remedies.

9 9. Plaintiff is barred from any recovery against Defendant by reason of the doctrine of
 10 laches and undue delay in giving notice to Defendant.

11 10. No relief may be obtained under the complaint by reason of the Plaintiff's failure to
 12 do equity in the matters alleged in the complaint.

13 11. Prior to any acts of the Defendant complained of in the complaint, Plaintiff had
 14 breached the agreements and obligations upon which Plaintiff seeks damages. Plaintiff's breaches
 15 thus excused any obligation to perform that might be said to be resting on the Defendant. Plaintiff's
 16 breaches occurred when the Defendant was performing as the parties had expressly agreed, and the
 17 breach constituted a breach of Plaintiff's obligations in violation of contract and of the inherent
 18 covenant of good faith and fair dealing.

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21 WHEREFORE, Defendant prays for judgment as follows:

- 22 1. That Plaintiff take nothing by the complaint;
- 23 2. That the complaint be dismissed or transferred to the United States District
 24 Court for the District of Minnesota;
- 25 3. That the Court issue a declaratory judgment holding that all disputes between
 26 Plaintiff and Defendant are subject to the arbitration agreement of the parties;
- 27 4. That Defendant receive an award of reasonable attorneys' fees;
- 28 5. That Defendant receive an award of costs of suit herein; and

1 6. That Defendant receive an award of such other and further relief as the Court
2 deems proper.

3 DATED: May 1, 2008

4 McDONOUGH HOLLAND & ALLEN PC
5 Attorneys at Law

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7 By: /s/ Richard W. Osen
8 Richard Osen (SBN 042566)
9 Ann Taylor Schwing (SBN 91914)
10 Julie A. Raney, Esq. (SBN 176060)

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12 Attorneys for Defendant
13 The Bergquist Company

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